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CITATIONS

384213—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE ALLEN-BRADLEY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINION BELOW

The opinion of the Court of Claims and the dissenting opinion of Chief Judge Jones (Appendix A, *infra*, pp. 12–13) have not yet been reported.

JURISDICTION

The order of the Court of Claims granting the taxpayer's motion for summary judgment was entered on April 3, 1956 (Appendix A, *infra*, p. 12). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the War Production Board, in issuing necessity certificates for accelerated amortization, had authority to certify only part of the cost of a new facility.

2. Whether the legality of the War Production Board's action in issuing such a certificate could be tested many years later under a claim for a refund of taxes, rather than through direct review.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 23 (t) and 124 of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124–6, all of which are set forth in Appendix B, *infra,* pp. 14–18.

STATEMENT

The facts alleged in the taxpayer's petition (R. 1–15), and admitted in the Government's answer (R. 17–18), on the basis of which the Court of Claims granted the taxpayer's motion for summary judgment (Appendix A, *infra,* p. 12), may be summarized as follows:

During World War II the taxpayer was engaged in the manufacture of motor controls, radio resistors and radio parts, which were in short supply at the time and were utilized in various kinds of military equipment. The taxpayer was requested by procurement officers of the Govern-

ment to increase its production of these products. (R. 4–5.)

In connection with the expansion of its plant capacity, the taxpayer applied for, and was issued, nine certificates of necessity under the provisions of Section 124 of the Internal Revenue Code of 1939, to permit accelerated amortization of the property for tax purposes. In three of the certificates, issued by the appropriate certifying authority, there was certified less than 100 percent of the costs of the facilities. The issuance of such certificates for less than 100 percent of cost was in accordance with the policy of the certifying authority not to permit rapid amortization of the full costs of facilities which would possess post-war utility to the taxpayer. (R. 5–6.)

One of the certificates in question, issued in 1943, certified 80 percent of the cost of the described facilities which were acquired by the taxpayer at a cost of $1,014,930.34. Another certificate, issued in 1944, was for 85 percent of the cost of the facilities which were purchased by the taxpayer for $125,990.28. The third certificate, issued in 1945, certified 35 percent of the cost of the facilities, which were acquired by the taxpayer for $38,913.75. (R. 7–10.)

In accordance with the provisions of Section 124 of the Internal Revenue Code of 1939, the taxpayer elected to take amortization deductions with respect to its emergency facilities over a period which began with the month following their ac-

quisition and terminated on September 30, 1945. (R. 12.) In its tax returns, the taxpayer computed its amortization deductions in accordance with the percentages set forth in these three certificates.

On March 30, 1953, the taxpayer filed claims for refund of excess profits tax and declared value excess profits tax for its fiscal years ending November 30, 1944, and November 30, 1945, based on its assertion that it was entitled to amortize the full costs of the facilities during the period ending September 30, 1945, and was not to be restricted to amortization of the percentages of cost that had been certified in the certificates of necessity. After the Commissioner of Internal Revenue had rejected the claims for refund, this action was instituted in the Court of Claims seeking a refund of taxes allegedly overpaid because of the taxpayer's failure to deduct in its returns amortization based on the full costs of the facilities. (R. 14.)

The Court of Claims granted the taxpayer's motion for summary judgment on the authority of its own prior decisions in *Wickes Corp.* v. *United States,* 108 F. Supp. 616, and *Ohio Power Co.* v. *United States,* 129 F. Supp. 215, certiorari denied, 350 U. S. 862, rehearing denied, 350 U. S. 919, and refused to follow the contrary decision of the Second Circuit in *Commissioner* v. *National Lead Co.,* 230 F. 2d 161 (C. A. 2) (Appendix C, *infra,* pp. 19–25). Chief Judge Jones dissented.

REASONS FOR GRANTING THE WRIT

The present tax controversy has its origin in the Congressional policy of encouraging needed plant expansion during World War II by permitting accelerated amortization deductions, for tax purposes, with respect to plant facilities which were certified as necessary in the interest of the national defense by the appropriate certifying authority. The War Production Board was empowered to issue such certificates during the most substantial part of the war period. Even though it appeared that plant facilities would be useful to the war effort, it was the policy of the War Production Board, in certain circumstances, to issue certificates for less than 100 percent of the cost of the property.

The ultimate question is whether a holder of a certificate for less than 100 percent of cost is, nevertheless, entitled to amortize the full cost of the property during the accelerated statutory period.

1. The decision in this case is in direct conflict with that of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161 (C. A. 2). The opinion in that case is reproduced in Appendix C, *infra*, pp. 19–25, for the convenience of the Court. In that case, as here, the taxpayer had been issued certificates of necessity under Code Section 124 which certified only a part of the cost of the facilities. As here, the taxpayer accepted the certificates and did not seek

direct judicial review or correction of the War Production Board's refusal to issue certificates for the full cost of the property.

The Court of Appeals in the *National Lead* case, reversing the Tax Court, held that the taxpayer could not, in a proceeding involving its tax liability, question the appropriateness of the certificates of necessity issued to it or assert its right to amortization based on the full cost of the facilities when the certificates issued to it were for smaller percentages. The court pointed out that, if the taxpayer had been aggrieved by the action of the War Production Board, the proper procedure would have been to institute a timely and direct attack on its action, by way of mandamus or appropriate injunction proceedings, to compel a prompt and proper exercise of the Board's discretion. If the taxpayer had instituted such proceedings and had it succeeded in persuading the court that, if the Board utilized its discretion to issue any certificate, it was required under Section 124 to issue one covering the full cost of the property,[1] it would still have

[1] It is significant that mandamus compelling the certifying authority to issue 100 percent certificates was refused in *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D. D. C.), affirmed *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904, the decision resting on the ground that the statute made it discretionary whether certificates for less than 100 percent would be issued. Consequently, had the taxpayer sought direct review of the War Production Board's action

been possible, as the Court of Appeals observed, that the certifying authority would have exercised its discretion by refusing to issue any certificate to the taxpayer. In this connection, the *National Lead* opinion appropriately states (Appendix C, *infra,* pp. 24–25):

> Since the Board [War Production Board] never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. * * * It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. * * *

In short, the court in *National Lead* held (Appendix C, *infra,* p. 25) that having accepted the certificates the taxpayer "is now bound by [their] limitations."

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in the District of Columbia courts, it most likely would have been unsuccessful and would have been barred from relitigating the issue on principles of *res judicata.*

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It is impossible to reconcile the decision in the present case, as well as the prior decisions of the Court of Claims (*Wickes Corp.* v. *United States,* 108 F. Supp. 616, and *Ohio Power Co.* v. *United States,* 129 F. Supp. 215, certiorari denied, 350 U. S. 862, rehearing denied, 350 U. S. 919), with the decision in *National Lead.* In *Wickes, Ohio Power,* and the present case, the Court of Claims has held that a taxpayer is not bound by a certificate of necessity issued for less than 100 percent of cost, and is entitled to attack the agency action collaterally and to compute its tax just as though it had actually received a certificate certifying the full cost of the property. Indeed, in the present case, the opinion of the Court of Claims recognizes that *National Lead* is a "contrary decision" (Appendix A, *infra,* p. 12) which the court refuses to follow.

2. In addition to the error committed by the court below in sanctioning a collateral attack on the administrative determinations made by the War Production Board more than ten years ago, we believe that the Court of Claims was also wrong in this and its prior decisions in concluding that the Board lacked statutory authority to issue certificates for less than 100 percent of the cost of a facilitity. Although the Court of Appeals in the *National Lead* case, because of its conclusion that the taxpayer no longer had a right to raise

the issue, was not required to reach the question of the statutory authority of the War Production Board, nevertheless, its comments demonstrate why the Court of Claims has adopted an erroneous view of the statute. Referring to the reasoning of the Court of Claims in the *Wickes* case, *supra*, the opinion of the Second Circuit says (Appendix C, *infra*, pp. 23–24):

> The difficulty with this argument is that it assumes the determination of a facility's necessity to the national defense to be a black-or-white proposition ascertainable without reference to the cost to the Government. The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35% or 50% rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the deter-

mination as to necessity might not be the same.

The decision of the Court of Claims, moreover, to the extent that it also rests on the conclusion that the War Production Board had no statutory authority to issue cerificates of necessity which certified less than the full cost of a facility, is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *United States Graphite Co.* v. *Sawyer,* 176 F. 2d 868 (C. A. D. C.), affirming *per curiam, United States Graphite Co.* v. *Harriman,* 71 F. Supp. 944 (D. D. C.), certiorari denied, 339 U. S. 904, holding that such discretion had been given to the Board.

3. The issues raised by this case present important questions in the administration of the revenue. As was pointed out at greater length in the Government's petition for a writ of certiorari in *United States* v. *Ohio Power Co.,* No. 312, October Term, 1955, pp. 7–9, approximately 80 percent of the certificates issued by the War Production Board were partial certificates, of the kind involved in this case, all of which are now regarded as invalid in any tax proceeding in the Court of Claims, while the same kind of certificates, under the decision in the *National Lead* case, cannot be collaterally attacked in a tax proceeding which is reviewed by the Second Circuit. Furthermore, as was pointed out in the *Ohio Power* petition, we have been informed by the Internal Revenue Service that there are at least 39 pending

cases involving the same problem, and that the total amount of revenue at stake in all cases is approximately $62,000,000.

CONCLUSION

The Court of Claims has erroneously decided a question of importance in the administration of the revenue in conflict with decisions of the Courts of Appeals for the Second Circuit and for the District of Columbia Circuit. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1956.

APPENDIX A

In the United States Court of Claims

No. 290–55

(Decided April 3, 1956)

ALLEN-BRADLEY COMPANY

v.

THE UNITED STATES

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

This case involves the same question twice previously decided by this court: The *Wickes Corporation* v. *United States,* 123 C. Cls. 741; *The Ohio Power Co.* v. *United States,* 131 C. Cls. 95, certiorari denied, 350 U. S. 862. In accord is *National Lead Co.* v. *Commissioner,* 23 T. C. 988, 1002. The United States Court of Appeals for the Second Circuit reversed the Tax Court, *Commissioner* v. *National Lead Co.,* 1956 CCH, par. 9290.

We have reconsidered our earlier decisions in the light of the contrary decision cited above and, with deference, adhere to the view expressed in them.

The plaintiff's motion for summary judgment is granted, and judgment will be entered for the plaintiff. The amount of recovery will be determined pursuant to Rule 38 (c).

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Chief Judge,* dissenting:

I dissent for reasons stated in dissents in the *Wickes* and *Ohio Power Company* cases cited in the majority opinion.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(t) [As added by Section 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction.*—The deduction for amortization provided in section 124.

* * * * *

(26 U. S. C. 23.)

SEC. 124 [As added by Section 302, Second Revenue Act of 1940, *supra*] AMORTIZATION DEDUCTION.

(a) [As amended by Section 155 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such

month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23 (l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(e) [As amended by Section 155 (d) of the Revenue Act of 1942, *supra*] *Definitions.*—

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

* * * * *

(f) [As amended by Section 155 (e), Revenue Act of 1942, *supra*] *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has

certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(26 U. S. C. 124.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.124–6 [As amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted Basis of Emergency Facility.*—(*a*) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the

certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124–7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the same facts as in the example in the preceding paragraph,

except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000, or $150,000.

* * * * *

APPENDIX C

United States Court of Appeals
For the Second Circuit

No. 253—October Term, 1955

(Argued January 13, 1956; Decided February 14, 1956.)

Docket No. 23902

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NATIONAL LEAD COMPANY, RESPONDENT

Before: CLARK, *Chief Judge*, FRANK and LUMBARD, *Circuit Judges.*

The Commissioner of Internal Revenue petitions for review of a decision of the Tax Court, J. E. MURDOCK, *Judge*, 23 T. C. 988, holding that the War Production Board had no authority to issue partial certificate of necessity under § 124 of the Internal Revenue Code of 1939 and that the taxpayer is entitled to amortization of the entire cost of facilities covered by such certificates. Reversed.

LUMBARD, *Circuit Judge:*

This is a petition by the Commissioner for review of a decision by the Tax Court that the taxpayer was entitled to accelerated amortization under § 124 of the Internal Revenue Code of 1939 (as amended) of the entire cost of certain "emergency facilities" constructed during World War II. Section 124 (e) (1) provided:

> As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made.

Section 124 (f) (1) provided for the inclusion in the basis of such an emergency facility of:

> so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

Section 124 (f) (3) further provided that:

> In no event and notwithstanding any of the other provisions of this section, no amortization deduction shall be allowed in respect of any emergency facility for any taxable year—(C) unless a certificate in respect thereof under paragraph (1) shall have been made (i) prior to the filing of the taxpayer's return for such taxable year, or prior to the making of an election * * * to take the amortization deduction, or (ii) before December 1, 1941, whichever is later * * *

On December 17, 1943, the President transferred the certifying function to the War Produc-

tion Board. Executive Order 9406, 8 Fed. Reg. 16955. In 1944 the Board issued to the taxpayer certificates that the facilities now in question "are necessary to the national defense during the emergency period, up to 50% [or in some cases 35%] of the cost attributable to the construction, reconstruction, erection, installation, or acquisition thereof * * *." It appears that these partial certificates were issued pursuant to a policy of the WPB, adopted toward the end of the war, of certifying only that part of the cost of a facility attributable to excess war costs.

In filing its return for 1944 the taxpayer claimed accelerated amortization only for the percentage of the cost which had been certified, taking ordinary depreciation on the rest. When the Commissioner subsequently asserted a deficiency against the taxpayer for the year 1944 based on other grounds, the taxpayer filed a petition with the Tax Court on November 21, 1951, seeking to have that court review the deficiency. On April 9, 1954, the taxpayer filed an amended petition, claiming for the first time that the WPB had no authority under the statute to certify only excess war costs and that it is entitled to amortization of the entire cost of the facilities. The Tax Court accepted this argument.

The question whether the WPB had authority to issue these partial certificates presents an interesting problem of statutory interpretation on which courts have differed. Compare *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, aff'd *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, cert. denied, 339 U. S. 904, with *Wickes Corp.* v. *United States*, 108 F. Supp.

616 (Ct. Cl. 1952) and *Ohio Power Co.* v. *United States,* 129 F. Supp. 215 (Ct. Cl. 1955), cert. denied, 350 U. S. 862. We do not reach this question, however, since we conclude that the taxpayer no longer has any right to raise the issue.

The statutory provisions set out above map out a scheme in which the function of determining whether facilities are necessary to the national defense is entrusted solely to the WPB. The determination whether facilities are necessary is within that agency's discretion and is conclusive so long as the discretion is exercised on the basis of criteria not clearly irrelevant to the statutory purpose. An exercise of the agency's discretion is preliminary to any right to claim accelerated amortization under the Code. The agency's decision ordinarily must take place and be evidenced by a certificate made prior to the time when a tax return for the year in question is filed.

It seems clear that if the WPB had denied a certificate altogether on the ground that the facilities were not necessary to the national defense, there would be no review of that action in any forum. Even if the WPB had refused to exercise its discretion or had based its decision on grounds impermissible under the statute, the failure to issue a certificate could not be challenged in the Tax Court. That Court could not exercise the discretion committed to the WPB under the statute and would therefore be incapable of correcting that agency's error.

But the taxpayer urges that we do not have that problem here because it was implicit even in the issuance of the partial certificates that the WPB had determined the facilities to be neces-

sary to the national defense. We do not agree. The certificates stated only that the facilities were "necessary to the national defense up to 50% [or 35%] of the cost." This statement did not explicitly say that the facilities were necessary in their entirety. Nor is it implicit in the certificate given that the WPB would have determined the facilities to be necessary if the consequence of that determination had been to allow accelerated amortization of the entire cost. The taxpayer's argument on this point follows that of the Court of Claims in *Wickes Corp.* v. *United States, supra.* The Court there said:

> The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not "necessary in the interest of national defense during the emergency period" would have said to itself, "If we make a true statement it will cost the Government X dollars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth."

The difficulty with this argument is that it assumes the determination of a facility's necessity to the national defense to be a black-or-white proposition ascertainable without reference to the cost to the Government. The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of

the facility in the scheme of national defense and the cost of the facility to the Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35% or 50% rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. Cf. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20–21 (1952). The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, D. C. D. C. (1944), aff'd *per curiam sub nom., United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (D. C. Cir. 1949), cert. denied, 339 U. S. 904, and the remedy was altogether appropriate. If the petitioner had sought mandamus or appropriate injunctive relief

in the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. Cf. *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 512–13 (1953). The language of the Supreme Court in the *Callanan* case is quite pertinent here:

> The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave. 345 U. S. at 513.

The taxpayer here may well have been denied a certificate altogether if it had challenged the Board's action. Having accepted the certificate it is now bound by its limitations.

The decision of the Tax Court is reversed.

U. S. GOVERNMENT PRINTING OFFICE: 1956